Supreme Court, U.S.
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No. 02-

In the Supreme Court of the United States

CINCINNATI SMSA LIMITED PARTNERSHIP,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Communications Act of 1934 provides that no "State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). The Ohio Supreme Court held that this federal statute does not preempt either a state-law claim that commercial mobile radio service ("CMRS") providers engaged in unreasonable rate discrimination or a state-law requirement that such providers maintain separate wholesale and retail business operations and records. The questions presented are:

1. Whether a state-law claim of unreasonable rate discrimination "regulate[s] * * * the rates charged by" CMRS providers within the meaning of Section 332(c)(3)(A).

2. Whether a state-law requirement that CMRS providers maintain separate wholesale and retail business operations and records "regulate[s] the entry" of such providers within the meaning of Section 332(c)(3)(A).

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Cincinnati SMSA Limited Partnership ("CLP") has one general partner, Ameritech Mobile Communications LLC, which is not publicly traded and which is an affiliate of Cingular Wireless LLC, which also is not publicly traded. The limited partners of CLP are (i) Convergys Information Management Group, which is owned by Convergys Corporation, a publicly traded company; (ii) ALLTELL Communications Investment Company, which is owned by ALLTELL, a publicly traded company; and (iii) GIT-Cell, Inc., which is not publicly traded.

Respondent is the Public Utilities Commission of Ohio.

Westside Cellular, Inc. was also a party to the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App., *infra*, 1a-3a) is reported at 98 Ohio St. 3d 1463; 781 N.E. 2d 1012. The opinion and order of the Public Utilities Commission of Ohio (App., *infra*, 4a-176a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 30, 2002. App., *infra*, 1a. The court denied rehearing on February 19, 2003. *Id.* at 177a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

The Communications Act of 1934 provides, in pertinent part, that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service * * * except that this * * * shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A).

STATEMENT

In 1993 Congress amended the treatment of commercial mobile radio service ("CMRS") in the Communications Act of 1934 to promote that industry's continued growth and development. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312 ("1993 OBRA Amendments"). CMRS encompasses all mobile forms of commercial wireless communication systems, including cellular, personal communication, paging, and airplane telephone service. *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services,* 9 F.C.C.R. 5408, 5416-5417 (1994).

The 1993 OBRA Amendments fundamentally changed the regulatory regime for CMRS administered by the Federal Communications Commission ("FCC" or "Commission").

Recognizing that wireless services operate without regard to state lines, Congress ensured national uniformity by preempting state "authority to regulate the entry of or the rates charged" by CMRS providers. 47 U.S.C. § 332(c)(3)(A).

In a decision flatly contrary to the congressional prohibition on state regulation of market "entry" or "rates" for CMRS, the Ohio Supreme Court held in this case that neither state-law rate discrimination claims against CMRS providers — which are premised on the alleged "unreasonableness" of the rates — nor a state-law requirement that CMRS providers maintain separate wholesale and retail operations and records — a structural requirement for entry into the market that was specifically rejected by the FCC — are preempted by Section 332.

Petitioner Cincinnati SMSA Limited Partnership ("CLP") is a CMRS provider in Ohio and adjacent states that was the subject of a complaint in the respondent Public Utilities Commission of Ohio ("the PUCO") by Westside Cellular, Inc. ("Cellnet"), a CMRS reseller. The PUCO, rejecting CLP's federal preemption arguments, concluded that CLP had violated Ohio law by failing to maintain separate wholesale and retail business operations and records and by proposing to charge Cellnet unreasonably discriminatory rates for CMRS. Cellnet was, as a result, entitled to treble damages under Ohio law.

The Ohio Supreme Court upheld the PUCO's jurisdiction to decide claims of unreasonable rate discrimination and to enforce a separation requirement for wholesale and retail CMRS operations. This decision subverts Congress's goal of establishing uniform national regulation of the "entry of" and the "rates charged by" CMRS providers, which is vital to the nation's telecommunications policy. Moreover, in conflict with decisions of this Court and lower federal and state courts, the Ohio Supreme Court turned federal preemption law upside down, authorizing state regulation — backed by the threat of treble damages — in a field that Congress has reserved to the federal government. The result will be regulatory chaos that

imperils the continued growth and development of wireless services nationwide. Review by this Court is plainly warranted.

A. Federal Regulation Of CMRS.

1. *The development of the CMRS market.*

Over the last 25 years, the wireless communication industry has grown at a remarkable rate. As of December 2002, CMRS providers had over 140 million subscribers and more than 190,000 employees in the United States. Cellular Telecomm. Indus. Ass'n, *Semi-Annual Wireless Industry Survey Results June 1985 — December 2002* (2003), http://www.wow-com.com/pdf/CTIA_Survey_Yearend_2002.pdf ("*CTIA*"). This massive and sustained growth has made CMRS an "integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587 ("*House Report*").

The growth of CMRS is largely the result of federal policies. The FCC initially licensed only one CMRS system in each market because it believed that the technical complexity and expense of providing such service would make it impossible to have multiple systems. See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469, at ¶ 4 (1981). To meet heightened demand and to promote competition, however, the FCC increased the spectrum allocation in 1981 and divided it between two competing CMRS providers in each market. *Id.* at ¶ 15. The FCC exercised its authority to assert "federal primacy over the areas of technical standards and competitive market structure for cellular service." *Id.* at ¶¶ 82-83.

The premise of the federal CMRS policy has been that the industry should operate as a competitive market in which success is "driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs — and not by strategies in the regulatory

arena." *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. 1411, 1420 (1994) ("*CMRS Order*").

In developing this policy, the FCC specifically addressed the role of CMRS resellers. The FCC generally prohibited CMRS providers from restricting the resale of their services, requiring that "resellers must be permitted to resell cellular service under the same terms and conditions offered to retail customers." *Cellular Resale NPRM and Order*, 6 F.C.C.R. 1719, at ¶ 44 (1991) ("*Resale NPRM*"). The FCC rejected a requirement that CMRS providers establish separate wholesale and retail operations, because the Commission was "not persuaded that it would be wise policy at this time to consider the need for separate accounting for wholesale/retail operations [or] regulate wholesale rates of return." *Id.* at ¶¶ 52, 54-55.

CMRS providers are subject to the general prohibition in the Communications Act against unreasonable discrimination in rates or service. See 47 U.S.C § 202(a) ("[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges"); see also *id.* § 201(b) ("[a]ll charges * * * for and in connection with such communication service, shall be just and reasonable"). Any person damaged by a violation of these provisions may file a complaint with the FCC or bring suit in federal court. *Id.* § 207.

Until 1993, however, the regulation of CMRS rates and market entry was not entirely a federal concern. Under the Communications Act, only CMRS providers engaged in interstate (or foreign) wire or radio communications were required to file tariffs with the FCC, which the Commission was authorized to review for reasonableness. 47 U.S.C. §§ 203(a), 204(a). Intrastate wire or radio communications were subject to state regulation. Regulatory jurisdiction was thus "divided between federal and state authorities, largely along an interstate/intrastate line." *Ball* v. *GTE Mobilnet of California*, 96 Cal. Rptr. 2d 801, 804 (Cal. Ct. App. 2000); see 47 U.S.C.

§ 152(b); *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379-382 (1999).

The increasing need for a national approach to CMRS rates and market entry was dictated by the nature of this service. CMRS differs substantially from traditional home or office telephone service because wireless service is not constrained by state boundaries. Wireless service areas frequently include portions of multiple states. Furthermore, because wireless telephones are portable, they routinely are used in more than one state. A wireless call may originate in one state, the caller may drive into a second state, and the call may be routed and switched to a third state. See Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act Of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 FED. COM. L.J. 547, 550 (1998).

2. *The 1993 OBRA Amendments.*

In light of the sustained growth and interstate character of CMRS, Congress amended the Communications Act in 1993 to provide for increased uniformity nationwide in CMRS regulation. *Connecticut Dep't of Public Util. Control* v. *FCC*, 78 F.3d 842, 845 (2d Cir. 1996). The 1993 OBRA Amendments authorized the FCC to exempt CMRS from the tariff filing requirements of the Communications Act, 47 U.S.C. § 332(c)(1)(A), which the Commission did in 1994. See *CMRS Order* at ¶ 14; 47 C.F.R. § 20.15. In addition, Congress removed any state authority over CMRS rates and market entry, specifying that "no state or local government shall have authority to regulate 'the entry of or the rates charged'" for CMRS. *Petition of the People of the State of California and the Public Utilities Commission of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7487 (1995) ("*California Order*") (quoting 47 U.S.C. § 332(c)(3)(A)).[1]

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[1] The effective date for the preemption provision was delayed until August 10, 1994, to give each state an opportunity to petition the FCC for continued

Section 332 "establish[ed] a *national* regulatory policy for [CMRS], not a policy that is balkanized state-by-state." *California Order* at ¶ 24 (emphasis added). Congress eliminated unnecessary and conflicting state regulations to foster continued growth and development of CMRS. The only state authority remaining under the Communications Act is the regulation of the "terms and conditions" of CMRS other than market "entry" and "rates." 47 U.S.C. § 332(c)(3)(A). By limiting state authority, Congress "replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework" and gives the FCC "flexibility to establish appropriate levels of regulation for [commercial] mobile radio service[]." *CMRS Order* at ¶ 12.

The 1993 OBRA Amendments were "intended to promote rapid deployment of a wireless telecommunications infrastructure" backed by "[r]obust investment." *Regulatory Control of the Rates of Wholesale Cellular Service Providers*, 10 F.C.C.R. 7025, 7031-7032 (1995). The FCC "facilitate[s] the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment * * * and by establishing a stable, predictable regulatory environment that facilitates prudent business planning." *Ibid.*

To increase CMRS investment, the FCC in 1996 reconsidered its policy generally prohibiting restrictions on CMRS resale. See page 4, *supra*. The Commission decided to continue the proscription, but — because of the development of competition in CMRS — the rule was amended to eliminate this prohibition "five years after the last group of initial licenses for the broadband PCS spectrum * * * is awarded." 47 C.F.R. § 20.12(b)(3).[2] The FCC also decided (again) not to "require

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authority over CMRS rates to address unusual market conditions in the state. 47 U.S.C. § 332(c)(3)(B).

[2] The FCC announced that the prohibition on resale restrictions would end "at the close of November 24, 2002." *Commencement of Five-Year Period*

providers to structure their operations or offerings in any particular way, such as to promote resale, or adopt wholesale/retail business structures, or establish a margin for resellers, or guarantee resellers a profit." *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 F.C.C.R. 18455, at ¶ 12 (1996), *aff'd, Cellnet Communications* v. *FCC*, 149 F.3d 429 (6th Cir. 1998) ("*Resale Order*").

The creation of a uniform national regulatory regime with a focus on competition and investment in CMRS has produced enormous public benefits. In the ten years since the 1993 OBRA Amendments were adopted, the CMRS industry has attracted over $100 billion in additional capital investments. See *CTIA*, *supra*. Moreover, the FCC's recent report on CMRS competition found that significant progress has been made: "the CMRS industry continues to benefit from the effects of increased competition as evidenced by lower prices to consumers and increased diversity of service offerings." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 15 F.C.C.R. 17660, 17663 (2000).

B. Ohio Regulation Of CMRS.

1. *The regulatory requirements of Ohio law.*

Ohio has also asserted regulatory jurisdiction over CMRS. Under state statutes generally applicable to public utilities, Ohio prohibits "unreasonable" discrimination in rates or service by CMRS providers. Ohio Rev. Code § 4905.35(A) ("[n]o public utility shall make or give an undue or unreasonable preference or advantage to any person * * * or subject any person * * * to any undue or unreasonable prejudice or disadvantage."); *id.* § 4905.33(A) ("[n]o public utility shall directly or indirectly * * * charge, demand, collect, or receive * * *

Preceding Termination of Resale Rule Applicable to Certain Covered Commercial Mobile Radio Service Providers, 13 F.C.C.R. 17427 (1998).

greater or lesser compensation for any services rendered, or to be rendered, * * * than it charges, demands, collects, or receives * * * for doing a like and contemporaneous service under substantially the same circumstances and conditions * * *."); App., *infra*, 9a-11a.

The PUCO first addressed CMRS in a 1985 proceeding. See *In the Matter of the Commission Investigation into the Regulatory Framework for Telecommunication Services in Ohio,* No. 84-944-TP-COI, 1985 Ohio PUC LEXIS 44, at *1 (Apr. 9, 1985). The principal issue was whether the PUCO should regulate CMRS providers — "nontraditional telephone companies" — in a manner different from the PUCO's traditional "regulation of * * * telephone companies." *Id.* at *2.

The PUCO determined that CMRS providers are telephone companies subject to its jurisdiction, but that resellers of CMRS are not, because (unlike traditional long distance telephone resellers) they have no technical involvement in the transmission or the routing of calls. 1985 Ohio PUC LEXIS 44, at *32. The PUCO held that a CMRS retailer affiliated with a CMRS wholesaler must "maintain[] * * * a separate set of accounting records from the operations of the underlying carrier and * * * ha[ve] no involvement whatsoever in the wholesale operations of the underlying carrier 'other than as a customer on equal terms as any nonaffiliated cellular reseller.'" App., *infra*, 66a. The prohibition on unreasonable rate discrimination under Ohio public utilities law continued to apply to CMRS providers. *Ibid.*

The PUCO reconsidered its CMRS regulations in 1993. See *In the Matter of the Commission Investigation into the Implementation of Sections 4927.01 Through 4927.05, Revised Code, as they Relate to Competitive Telecommunication Services*, No. 89-563-TP-COI, 1993 Ohio PUC LEXIS 1161, at *49 (Dec. 22, 1993). The PUCO concluded that the CMRS "industry was entitled to additional regulatory relief by temporarily waiving the tariff and contract filing provisions related to services provided by the underlying wholesale carrier to its nonutility

resale or end user customers." App., *infra*, 66a. But the PUCO reaffirmed the "requirement" that a CMRS reseller's operations be "'maintained under a separate set of accounting records from the operations of the wholesale cellular provider and, [that] * * * the affiliate reseller ha[ve] no involvement whatsoever in the wholesale cellular provider's operations.'" *Id.* at 67a. This "requirement was intended to permit a subsequent review of transactions between the underlying wholesale carrier and its affiliated reseller for the purpose of ascertaining whether" there was unreasonable discrimination in favor of the affiliate. *Ibid.*[3]

2. *Ohio's petition to retain "rate" and "market entry" authority over CMRS.*

Following the 1993 OBRA Amendments, Ohio used the opportunity afforded by Congress (see note 1, *supra*) to petition the FCC to retain authority over CMRS rates and entry in the State. See *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842, ¶ 3 (1995) ("*Ohio Order*"). Congress had "provided that, if a State had 'any regulation concerning the rates for [CMRS] * * * as of June 1, 1993, it could retain its rate regulation authority by petitioning" the FCC and demonstrating, among other things, that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." *Ibid.* (quoting 47 U.S.C. § 332(c)(3)(A)).

Ohio's petition asserted that "it does not presently set rates or limit market entry" of CMRS providers. *Ohio Order* at ¶ 28. Ohio acknowledged using "its complaint authority to ensure

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[3] Six years later, the PUCO "eliminat[ed] this requirement * * * to ensure that no company will be restricted from entering the Ohio market as a result of a mandated structural organization." *In the Matter of the Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC LEXIS 745, at ¶ 41 (Dec. 16,1999) ("*Structural Order*").

that the rates of a cellular wholesaler are not unduly discriminatory, preferential to affiliates, or anticompetitively set," but stated that it "does not believe * * * [this] constitutes rate and entry regulation preempted by Section 332(c)." *Ibid.*

The FCC denied Ohio's petition, accepting at face value the State's assertion that it was not "regulating 'the rates charged' by any CMRS provider in that state as of June 1, 1993." *Ohio Order* at ¶ 31. Ohio also "failed to meet its statutory burden of showing that market conditions for the service(s) at issue fail to protect subscribers adequately from unjust and unreasonable rates, or unjustly and unreasonably discriminatory rates." *Ibid.*

Regarding Ohio's authority over complaints against CMRS providers, the FCC noted that, "although Ohio may not prescribe, set, or fix rates in the future because it has lost authority to regulate 'the rates charged' for CMRS rates, it does not follow that its complaint authority under State law is entirely circumscribed." *Ohio Order* at ¶ 43. Section 332(c)(3) allows the States to "regulat[e] the other terms and conditions" of CMRS apart from rates and market entry. The FCC quoted (at ¶ 41) the House Report on the 1993 OBRA Amendments, which states that "the other terms and conditions" include "customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis * * *." *House Report* at 588.

The FCC found the "other terms and conditions" language "sufficiently flexible to permit Ohio to continue to conduct proceedings on complaints" regarding consumer matters and "contractual agreements between two or more CMRS providers * * * to the extent that such review does not directly affect end-user rates." *Ohio Order* at ¶ 43. The Commission "conclude[d] generally that several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation." *Ibid.* "For example, a requirement that licensees

identify themselves to the public utility commission * * * does not strike us as rate regulation, so long as nothing more than standard informational filings is involved." *Ibid.*

The FCC declined to "[e]stablish[] with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions," which would "require[] a more fully developed record than is presented by the Ohio Petition." *Ohio Order* at ¶ 42. The Commission suggested that "any interested party seek[ing] reconsideration on this issue * * * specify with particularity the provisions of the Ohio regulatory practice at issue." *Id.* at ¶ 44.

Ohio filed a petition for reconsideration. *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service*, 10 F.C.C.R. 12427, at ¶ 11 (1995) ("*Ohio Reconsideration Order*"). The State's only request, however, was "that it be permitted to supplement its petition for reconsideration at a later date with the results of an on-going complaint proceeding involving a retail cellular reseller and several wholesale cellular providers in Ohio." *Ibid.* The PUCO proceeding to which the State referred was this very case —initiated by Cellnet against CLP and other CMRS providers in Ohio (see page 2, *supra*). Cellnet alleged that "the respondents did not maintain separate accounting records for their wholesale and retail operations" and that the respondents engaged in unreasonable rate discrimination. *Id.* at ¶ 12.

The FCC denied Ohio's reconsideration petition because, among other reasons, the State did not specify "what error in the Ohio Order * * * is complained of." *Ohio Reconsideration Order* at ¶ 21. The FCC referred Ohio to the discussion of Section 332 in the House Report quoted in the *Ohio Order* (at ¶ 41) as "the best available description of the boundaries of the PUCO's authority to regulate the 'other terms and conditions' of CMRS." *Ohio Reconsideration Order* at ¶ 24. "Ohio itself [must] determine which portions of its proposed actions with respect to investigating the development of resale competition

within the cellular industry have been preempted * * *. The record of this proceeding is not sufficiently detailed to permit us to comment meaningfully on the regulatory activities contemplated by the PUCO in the Cellnet proceeding." *Ibid.*

C. The Litigation Of Cellnet's Complaint Against CLP.

1. The Cellnet complaint to which the FCC referred was filed in the PUCO in October 1993 against CLP, the New Par companies, and two other respondents (including GTE Mobilnet) that were later dismissed from the case. App., *infra*, 4a-15a. The proceedings were extended to include conduct by the respondents from 1993 to 1998. *Id.* at 10a.

Cellnet alleged that New Par had engaged in unreasonable rate discrimination by charging Cellnet more for CMRS than New Par charged its affiliated resellers. App., *infra*, 10a. Cellnet never purchased CMRS from CLP; instead Cellnet alleged that CLP had refused Cellnet's request to "make capacity available to Cellnet on a wholesale basis" at the same rates CLP charged its retail business. *Id.* at 11a. Cellnet also alleged that CLP and New Par had failed to maintain separate operations and records for their wholesale and retail businesses. *Id.* at 10a.

New Par (joined by GTE Mobilnet) filed suit in the Northern District of Ohio to enjoin the PUCO proceeding on the ground that it was preempted by Section 332(c)(3)(A). See *GTE Mobilnet of Ohio* v. *Johnson*, 111 F.3d 469 (6th Cir. 1997). In opposition to the plaintiffs' motion for a preliminary injunction, Cellnet and the PUCO "argued that requiring GTE Mobilnet and New Par to charge affiliated and unaffiliated resellers the same price was not a form of rate-setting." *Id.* at 474. The district court disagreed, "reasoning that if Congress had intended automatically to reserve to the states the authority to control discriminatory rates, Congress would not have included in the statute subsection (i), which allowed a state to petition for authority to re-regulate rates when the rates are unreason-

ably discriminatory." *Ibid.* The court preliminarily enjoined the PUCO proceeding on Cellnet's complaint. *Ibid.*

The Sixth Circuit reversed, holding that the district court should have abstained under *Younger* v. *Harris*, 401 U.S. 37 (1971), in deference to the pending PUCO proceeding in which "GTE Mobilnet and New Par will have an adequate opportunity to raise their federal preemption claims," including "[j]udicial review of a final [PUCO] order * * * in the form of a direct appeal to the Supreme Court of Ohio." 111 F.3d at 482. The court of appeals concluded that the PUCO "must be allowed to resolve th[e] preemption question" in the first instance. *Ibid.*

The PUCO determined that Cellnet's claims related to "the other terms and conditions" of CMRS and were not preempted by Section 332(c)(3)(A). App., *infra*, 60a. The PUCO then received extensive testimony and numerous exhibits on CLP's and New Par's wholesale and retail business operations, including their rates, services, and customers. *Id.* at 49a-52a.

In its opinion on the merits, the PUCO found that CLP (and New Par) had violated Ohio law by not "maintain[ing] detailed records of transactions between its wholesale and retail affiliates or records of inquiries for cellular service" and by failing to follow the PUCO's "order regarding the separation of its wholesale and retail operations." App., *infra*, 69a-71a. Because CLP did not separate its wholesale and retail businesses and maintain records of transactions between the two operations, the PUCO "assume[d] that [CLP]'s internal wholesale rate is zero." *Id.* at 94a. Using this rate for comparison, the PUCO found that "it is apparent that [CLP]'s wholesale is charging Cellnet a higher rate for service than it is charging [CLP]'s retail." *Id.* at 95a. The PUCO thus concluded that, for the years 1995 to 1998, CLP "violated Section 4905.33, Revised Code, by charging Cellnet a higher rate for doing a like and contemporaneous service under substantially the same circumstances and conditions." *Id.* at 94a The PUCO also found that New Par had engaged in unreasonable discrimi-

nation in the rates and services it provided to Cellnet. *Id.* at 108a, 121a.

The PUCO imposed no damages or monetary penalties on CLP and New Par, noting with respect to Cellnet's damages claim that it was "simply engaged in an analysis of whether respondents have violated the law. * * * [A] court of competent jurisdiction will address the issue of whether the violation results in an injury to Cellnet and the amount of damages involved." App., *infra*, 60a.

2. CLP and New Par appealed to the Ohio Supreme Court, which issued a separate opinion for each appeal. App., *infra*, 1a, 178a. In New Par's appeal, the court rejected federal preemption, erroneously stating that this "argument has been adjudicated 12 times by various tribunals and regulatory agencies, including the [PUCO] and the FCC. Heretofore, New Par has enjoyed not a single unreversed determination of federal preemption under Section 332(c)(3)(A)." App., *infra*, 180a. The court declined to "reprise an analysis of the legal requirements for federal statutory preemption of state law," and simply concluded that the PUCO's adjudication of Cellnet's complaint "was not regulation of appellants' rates under Section 332, * * * because it was 'regulating the other terms and conditions of [appellants'] commercial mobile services' * * * [and] not preempted." App., *infra*, 181a.

In CLP's appeal, the Ohio Supreme Court relied largely on its opinion in the New Par appeal to dispose of CLP's preemption defense. App., *infra*, 2a. The court specifically addressed only CLP's argument that the PUCO had "engaged in rate-setting when it determined [CLP]'s internal wholesale rate to be zero." *Ibid.* The court held that the PUCO had "merely determined that the internal wholesale rate was zero based on examinations of [CLP]'s accounting records (or lack thereof) and consideration of testimony of [CLP] witnesses. This determination did not constitute preempted rate-setting by the [PUCO]." *Id.* at 2a-3a.

3. Cellnet brought a separate action against CLP and New Par in an Ohio trial court seeking damages based on the PUCO's findings that CLP and New Par had violated Ohio law. The court rejected the defendants' arguments that Cellnet's damages claims were preempted by Section 332(c)(3)(A) of the Communications Act, concluding that the issue had been definitively resolved by the Ohio Supreme Court. The state court held that Cellnet was entitled to recover treble "damages for the discriminatory conduct of the Defendants" under Ohio Rev. Code § 4905.61. Cellnet's recovery would "include damages for overcharges, lost profits, including lost customers, * * * all of which will be trebled." App., *infra*, 193a.

The calculation of Cellnet's claim for damages was based on the PUCO's finding that CLP's "internal wholesale rate" was zero. In light of this fanciful supposition, CLP would have "overcharged" Cellnet if it had charged *anything* for CMRS. Because CLP failed to offer its services for nothing, Cellnet sought over $1 billion in damages. Faced with this massive potential liability, CLP was forced to settle the case in April 2003, before the start of trial.

REASONS FOR GRANTING THE PETITION

Section 332 of the Communications Act defines the balance of power between the states and the federal government with respect to CMRS rates and market entry. It reflects a congressional determination that federal law should preempt *all* state regulation concerning these issues. The text of Section 332 is all-encompassing and unambiguous: "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). Congress considered this provision necessary to ensure a "stable and predictable federal regulatory environment, which is conducive to continued investment in the wireless infrastructure." *CMRS Order* at ¶ 25.

Uniform national regulation of wireless rates and market entry was required because CMRS "operate[s] without regard

to state lines." *House Report* at 587. Like the radio industry, which flourished in the early 20th Century with the advent of a national regulatory regime, see *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) ("[n]o state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities"), the wireless industry has grown dramatically in the last decade under federal regulation. Since the 1993 OBRA Amendments, CMRS has become a bedrock feature of the nation's telecommunications infrastructure.

Despite the success of the federal regulatory program for CMRS, Ohio has embarked on a different course that conflicts not only with the congressional requirement of exclusive federal regulation of CMRS rates and market entry, but also with specific policy decisions by the FCC. Moreover, because CMRS providers have service areas that extend into adjacent states, the Ohio Supreme Court's affirmation of the PUCO's authority in this case has extended the State's regulatory jurisdiction into Pennsylvania, West Virginia, Kentucky, Indiana, and Michigan. The potential for conflict and confusion in CMRS regulation — the very problem Congress sought to avoid by adopting Section 332 — is palpable.

This Court should grant review to restore the "stable and predictable federal regulatory environment" sought by Congress. The Ohio Supreme Court's decision is contrary to the text of Section 332(c)(3)(A) and invalid under the Supremacy Clause. By authorizing the PUCO to adjudicate claims of unreasonable rate discrimination, the Ohio Supreme Court has authorized the PUCO to "regulate * * * the rates charged by" CMRS providers, in violation of Section 332(c)(3)(A), which expressly preempts such authority. And by allowing the PUCO to enforce a separation requirement for wholesale and retail CMRS operations, the Ohio Supreme Court has allowed the State to "regulate the entry of" CMRS providers, which is expressly preempted by Section 332(c)(3)(A).

The Ohio Supreme Court's decision also conflicts with longstanding precedents of this Court on federal preemption of state rate regulation and many federal and state court decisions on federal preemption under Section 332 of the Communications Act and other federal statutes with similar regulatory schemes. Review by this Court is plainly warranted.

I. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE COURTS

The Ohio Supreme Court began its analysis with a false premise, stating incorrectly that the preemption arguments advanced by CLP have been rejected "12 times by various tribunals and regulatory agencies, including the [PUCO] and the FCC." App., *infra*, 180a. The court accepted the PUCO's and Cellnet's mischaracterization of the holdings of the Sixth Circuit and the FCC, which had expressly declined to resolve the preemption issues presented here. Both the Sixth Circuit and the FCC deferred to the PUCO to resolve those issues in the first instance. See 111 F.3d at 482 (the PUCO "must be allowed to resolve th[e] preemption question"); *Ohio Reconsideration Order* at 12438-12439.

In fact, the Ohio Supreme Court is the only court ever to have upheld state power to regulate CMRS on the matters at issue in this case. The great weight of federal and state court authority is to the contrary.

A. Rate Discrimination Claims Are A Longstanding Form Of Rate Regulation.

1. Whether Section 332(c)(3)(A) expressly preempts the authority of the State of Ohio to decide rate discrimination claims against CMRS providers is a matter of congressional intent. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983). The analysis "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales*

v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (internal quotation and citation omitted).

Section 332(c)(3)(A) provides that "no State * * * shall have any authority to regulate * * * the rates charged by any" CMRS provider. The issue here is whether state-law rate discrimination claims "regulate * * * rates." This Court has squarely held for almost a century that such state-law claims constitute rate regulation for federal preemption purposes. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil*, 204 U.S. 426 (1907). As the Court stated in *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976), under *Abilene Cotton* an "unreasonable rate" claim is preempted where it conflicts with federal regulation of rates. See also *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 473-474 (1959) (under *Abilene Cotton*, the "crucial question of reasonableness could not be decided by the courts").

The state regulatory authority endorsed by the Ohio Supreme Court is the authority to determine whether CMRS wholesale rates are "reasonable." A claim of rate discrimination requires a comparison of the rates and services offered by a seller to different purchasers and an assessment of whether any difference in the rates is "reasonable" based on a comparison of the service provided. As this Court has recognized, "[r]ates * * * do not exist in isolation" and "have meaning only when one knows the services to which they are attached." *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998) (a "policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services"). Thus, the Communications Act, 47 U.S.C. § 202(a), proscribes only "*unreasonable* discrimination" in rates.

Similarly, to support a claim of rate discrimination under state law, Ohio requires proof of an "unreasonable prejudice or disadvantage," Ohio Rev. Code § 4905.35(A), or that a CMRS provider charged a higher rate "for doing a like and contemporaneous service under substantially the same circumstances and

conditions," *id.* § 4905.33(A). The PUCO must hold a hearing on any complaint against a CMRS provider "whenever reasonable grounds appear that 'any rate * * * is in any respect unjust, *unreasonable, unjustly discriminatory*, unjustly preferential, or in violation of law.'" App., *infra*, 9a (quoting Ohio Rev. Code § 4905.26 (emphasis added)).

In finding that CLP violated Ohio law in this case, the PUCO determined that CLP had offered Cellnet "a higher rate for doing a like and contemporaneous service under substantially the same circumstances and conditions" than CLP charged its retail operations — with no "proper demonstration of the basis for the disparity in treatment." App., *infra*, 94a-95a.[4] In the absence of any reasonable justification for the difference, the rate offered to Cellnet was unreasonable under Ohio law.

This state-law determination unquestionably is rate regulation. In *Abilene Cotton*, the Court reviewed a state-law claim that the rate charged for an interstate rail shipment was "unreasonable." 204 U.S. at 430. The shipper "aver[red] that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter [haul] than for a longer haul." *Ibid.* The Court held that these claims were preempted by the Interstate Commerce Act, which required the railroad to file its rate with the Interstate Commerce Commission ("ICC") and authorized the ICC to determine whether the rate was "reasonable." *Id.* at 432, 440-442. The State had no authority to assess the "reasonableness" of a filed rate and

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[4] As described above (at page 13), the PUCO found that the wholesale "rate" offered to CLP's retail business was "zero," because CLP failed to maintain the separation of its wholesale and resale businesses and failed to maintain records of hypothetical transactions between CLP's wholesale and retail operations. App., *infra*, 94a. Using zero as the basis for comparison with the rates offered to Cellnet, the PUCO concluded that the disparity in rates was unreasonable. *Id.* at 95a. The separation requirement enforced by the PUCO, however, is a regulation of the "entry" of CMRS providers and is preempted by Section 332(c)(3)(A). See pages 26-28, *infra*.

adjudicate discrimination claims, because if courts had the power "to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness * * *." *Id.* at 440.

The rule established in *Abilene Cotton* has been applied consistently by this Court in other regulatory contexts. See *Nader*, 426 U.S. at 298-300 (Federal Aviation Act). For example, in *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 301 (1988), the Court interpreted the preemptive scope of the Natural Gas Act ("NGA"). Under the NGA, the Federal Energy Regulatory Commission had exclusive "authority over the rates and facilities of natural gas companies" involved in interstate commerce. *Ibid.* The issue in the case was whether the NGA prohibited, as "rate regulation," a Michigan statute that required companies "transport[ing] natural gas in Michigan for public use" to obtain the approval of the state public utilities commission "before issuing long-term securities." *Id.* at 297. The Court held that the state statute was preempted because one of its purposes was to prevent higher gas rates, which would occur if a company took "on more equity than it needs, requiring it to charge higher rates (because equity usually requires a higher rate of return)." *Id.* at 307. The Court concluded that, "[b]y keeping a natural gas company from raising its equity level above a certain point, Michigan seeks to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.' This is regulation of rates." *Id.* at 308. See also *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578-585 (1981) (states lacked authority under the NGA to determine whether a rate was "reasonable" in light of the fact that Congress "has granted exclusive authority over rate regulation to the Commission").

Thus, under this Court's longstanding precedents, "rate regulation" is defined broadly to include an assessment of the

"reasonableness" of a rate in resolving a discrimination claim. See Comment, *A Study of Federal Preemption and Its Impact on the Wireless Communications Industry: What Did Congress Really Have in Mind?*, 28 CAP. U. L. REV. 659, 677 (2000) ("*Federal Preemption*") ("rate regulation [i]s interpreted more broadly than the precise setting or determination of actual rates and encompasses those actions that are directed at ensuring reasonableness of rates as well"). Indeed, the analysis in *Abilene Cotton* has become a fundamental tenet of administrative law. See Charles H. Koch, ADMINISTRATIVE LAW AND PRACTICE, § 13.23 (2003) (under *Abilene Cotton*, allowing a "court to rule on a rate's reasonableness would undermine" federal regulatory authority over rates).

The Ohio Supreme Court plainly erred in failing to apply these precedents to the PUCO's adjudication of rate discrimination claims. Here, as in *Abilene Cotton*, the State seeks to impose its own determination of the "reasonableness" of a CMRS rate, despite the fact that Congress has removed "*any* authority" for the State to "regulate * * * rates" under Section 332(c)(3)(A). Moreover, as in *Abilene Cotton*, the State seeks to judge whether a CMRS rate is unreasonably discriminatory, despite the fact that the FCC exercises the same authority under the Communications Act. See 47 U.S.C. §§ 202, 207; see also *Federal Preemption* at 676-677 (allowing state regulation of "unreasonable rates" is inconsistent with Section 332).

2. Recent federal and state judicial and administrative decisions construe the preemptive scope of Section 332 broadly, in conflict with the Ohio Supreme Court. For example, the district court in the action brought by New Par to enjoin the PUCO proceeding held that Cellnet's rate discrimination claims were preempted. See pages 12-13, *supra*. The court relied on the congressional requirement that states must petition the FCC to "re-regulate rates when the rates are unreasonably discriminatory,"111 F.3d at 474, as proof that Congress did not intend to allow the states to decide rate discrimination claims in the

absence of a grant of authority from the FCC.[5] The Sixth Circuit disagreed with this analysis, but only to the extent that the court did not find a "'facially conclusive' claim of preemption" sufficient to divest the PUCO of authority to decide, in the first instance, the "preemption question" resolved by the district court. 111 F.3d at 480, 482.

In *Digital Communications Network, Inc.* v. *AT&T Wireless Servs.*, 63 F. Supp. 2d 1194, 1196-1198 (C.D. Cal. 1999), the court held that the California Public Utilities Commission ("CPUC") "lack[ed] subject matter jurisdiction" under Section 332(c)(3)(A) to decide claims that CMRS providers had engaged in "unjust and unreasonable practices" by failing to make certain retail service plans available to CMRS resellers. The CPUC itself had determined in several opinions that Section 332(c)(3)(A) preempts state-law rate discrimination claims. *Id.* at 1198-1199.[6] In *Digital*, the court referred the question of the "reasonableness" of the CMRS provider's rates under federal law, 47 U.S.C. §§ 201, 202, to the FCC because of the Commission's "expertise, skill, and ability to resolve the dispute." 63 F. Supp. 2d at 1199-1203. "Obtaining the views of the FCC would be instrumental to the Court in reaching its decision." *Id.* at 1202.

In a related context, the Seventh Circuit held that state-law claims based on allegations of inadequate CMRS service are

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[5] The FCC denied all seven petitions that were filed by states seeking continued authority over CMRS rates. See, *e.g.*, *Ohio Order*, *supra*; *California Order*, *supra*; *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 F.C.C.R. 7025 (1995).

[6] See, *e.g.*, *Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications*, Dec. No. 96-12-071, 1996 Cal. PUC LEXIS 1135, at *41-42 (Dec. 20, 1996). The CPUC has refused to consider a complaint that sought to require wholesale CMRS providers to offer certain services at particular rates. See *California Wireless Resellers Ass'n* v. *Los Angeles Cellular Tel. Co.*, Dec. No. 98-11-016, 1998 Cal. PUC LEXIS 793 (Nov. 5, 1998).

challenges to CMRS rates that are preempted by Section 332. In *Bastien* v. *AT&T Wireless Servs.*, 205 F.3d 983, 985 (7th Cir. 2000), a customer complained about the "quality of service" he received from his CMRS provider and filed a state suit alleging breach of contract and fraud. *Ibid.* The defendant removed the case to federal court. In considering the plaintiff's remand motion, the Seventh Circuit analyzed whether the state-law claims were preempted rate regulation under Section 332(c)(3)(A). The court concluded that the claims were preempted because, if the plaintiff prevailed, the CMRS provider would be forced either to provide better service for the same rates or to "lower [its] rates." *Id.* at 986-989.

Other courts have similarly concluded that a "claim involving inadequate service is actually an attack on rates because it implies that the service was not worth what the customer paid for it." *Bryceland* v. *AT&T Corp.*, 122 F. Supp. 2d 703, 709 (N.D. Tex. 2000); see, *e.g.*, *Ball* v. *GTE Mobilnet*, 96 Cal. Rptr. 2d 801 (Cal. Ct. App. 2000) (claim challenging calculation of airtime minutes was a preempted challenge to the provider's rates); *In re Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193 (E.D.Pa. 1996) (same).

The Ohio Supreme Court relied on the "other terms and conditions" language in Section 332(c)(3)(A) to support the PUCO's jurisdiction to hear rate discrimination claims. Several courts have held that this provision allows state-law claims based on alleged fraud or misrepresentations in the disclosures made by CMRS providers in offering services. See, *e.g.*, *Tenore* v. *AT&T Wireless Servs.*, 962 P.2d 104 (Wash. 1998); *Spielholz* v. *Superior Court*, 104 Cal. Rptr. 2d 197, 204 (Cal. Ct. App. 2001). But even the courts that allow state claims for "inadequate disclosure" regarding CMRS service conclude that Section 332(c)(3)(A) "preempts a state law action challenging the reasonableness or legality of [a] particular rate or rate practice itself." *Ball*, 96 Cal. Rptr. 2d at 810; *Spielholz*, 104 Cal. Rptr. 2d at 204 (a state-law claim that "directly challenges a rate as unreasonable * * * would directly regulate rates" and

be preempted). No court, other than the court below, has held that this provision authorizes state-law claims that have a direct impact on CMRS rates.

The FCC has emphasized that "the rates charged by" language of Section 332(c)(3)(A) should be construed broadly. See *In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19,898 (1999). The FCC determined in *Southwestern Bell* that state-law claims challenging a CMRS provider's practices of rounding up airtime to the nearest minute and charging for incoming calls were preempted. *Id.* at ¶ 19. On the other hand, the FCC has interpreted the "other terms and conditions" provision in Section 332(c)(3)(A) to authorize state jurisdiction over "carrier practices, separate and apart from their rates." *Ohio Order* at ¶ 43.

Although the FCC has not finished drawing the line between preempted rate regulation and "other terms and conditions" of CMRS — and expressly declined to address the issue in advance of the PUCO's consideration of the claims asserted by Cellnet in this case, see *Ohio Order* at ¶ 42 — it is apparent in the aftermath of the PUCO proceeding on Cellnet's complaint that the State has engaged in rate regulation. The Ohio Supreme Court erred in affirming the State's authority to do so in light of the text of Section 332, the *Abilene Cotton* line of cases, the foregoing federal and state decisions interpreting Section 332, and the FCC's decisions on this issue.

3. This conclusion is supported by decisions applying a broad definition of "rate regulation" in deciding preemption claims under similar federal statutes. For example, *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3d Cir. 1987), involved the preemption provision of the Staggers Rail Act of 1980, which stated that the jurisdiction of the ICC "over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive." 49 U.S.C. § 10501(d) (1982). The defendant in *G. & T. Terminal*

imposed surcharges on all rail shipments of potatoes by the plaintiffs. The ICC had elected not to regulate the rates for rail shipments of potatoes. 830 F.2d at 1231-1232. The plaintiffs filed a complaint alleging common-law claims that the defendant's rates were discriminatory and unreasonable. *Id.* at 1232. The Third Circuit framed the issue as whether *Abilene Cotton* applied to rates that the ICC had elected not to regulate. *Id.* at 1234. The court held that a common-law claim for rate discrimination was preempted as a "remed[y] * * * with respect to rates" under the Staggers Act. The court reasoned that "recognition of a tort remedy for discriminatory rates would involve case-by-case judicial regulation of rates in the face of a decision by a regulatory agency, acting pursuant to Congressional directives, that the market is sufficiently competitive that no regulation of rates is necessary." *Id.* at 1235 n.3.

The Ninth Circuit applied the same analysis in *Alliance Shippers, Inc.* v. *Southern Pacific Transportation Co.*, 858 F.2d 567 (1988). There, a shipper purchased trailer-on-flatcar service from the railroad, which the ICC had chosen not to regulate. The shipper discovered that other shippers were receiving better rates from the railroad and sued, alleging (among other things) state-law rate discrimination claims. 858 F.2d at 568. Citing *G. & T. Terminal*, the Ninth Circuit held that the *Abilene Cotton* rule applied to preclude the state claims as preempted rate regulation. *Id.* at 569-570.

Finally, *Storer Cable Communications* v. *City of Montgomery*, 806 F. Supp. 1518, 1543 (M.D. Ala. 1992), involved the Cable Communications Policy Act of 1984, which provides that state and local governments may not "regulate the rates for the provision of cable service," except as provided by federal law. 47 U.S.C. § 543(a). The court held that a municipal ordinance prohibiting "undue preference among customers" in cable rates was "[c]learly * * * rate regulation." *Id.* at 1543.

Under these precedents, Ohio's adjudication of state-law claims of unreasonable rate discrimination against CMRS

providers would be considered rate regulation preempted by Section 332(c)(3)(A). The Ohio Supreme Court's analysis is to the contrary. If the Ohio precedent is followed by courts (and public utility commissions) in other states, it would unsettle preemption not only under the Communications Act, but also under other federal statutes that preempt state rate regulation.

B. The Ohio Requirement Of Separate Wholesale And Retail Operations And Records Is A Regulation Of CMRS "Entry" In Violation Of Section 332(c)(3)(a).

The PUCO's conclusion that CLP's rates offered to Cellnet were "unreasonable" was based on its finding that CLP's "internal wholesale rate is zero." App., *infra*, 94a. The PUCO "assume[d]" a rate of zero because CLP had violated Ohio law by not maintaining separate "wholesale and retail operations" and not "maintain[ing] detailed records of transactions between its wholesale and retail" operations. *Id.* at 70a-71a.[7]

These "requirements" of Ohio law, on which CLP's liability was premised, plainly "regulate[d] the entry of" CMRS providers in the State in violation of Section 332(c)(3)(A). The practical effect of these requirements was to preclude a CMRS provider in Ohio from lawfully selling both to resellers and directly to the public. Every CMRS provider had to establish a CMRS retail affiliate and sell its service to the public through that affiliate — and maintain careful records of the transactions between its wholesale and resale businesses.

The PUCO itself concluded that these requirements regulated market "entry," finding (in its decision suspending the requirements prospectively) that CMRS providers would

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[7] The PUCO's analysis was based on the fiction that CMRS providers in Ohio (and elsewhere) had wholesale and retail operations that could be separated. In fact, CLP and virtually every other CMRS provider in Ohio operated as unitary entities and were not divided along wholesale and retail business lines. This structure was based, at least in part, on the FCC's rejection of a requirement that wholesale and retail CMRS operations be separated. See pages 4, 6-7, *supra*.

"be restricted from entering the Ohio market as a result of [the] mandated structural organization" of separate wholesale and retail business operations. *Structural Order*, *supra*, at *4; see note 3, *supra*. Imposition of requirements that must be satisfied before a CMRS provider may legally operate in a state is, by definition, "regulat[ing] the entry" of CMRS providers.

In *Consolidated Telephone Cooperative* v. *Western Wireless Corp.*, 637 N.W.2d 699, 702 (N.D. 2001), for example, the court held that Section 332(c)(3)(A) preempted North Dakota's requirement that "a telecommunications company generally must apply for a certificate of public convenience and necessity * * * if it wishe[d] to compete with another company furnishing adequate local [service]." *Id.* at 709. Because it operated as a barrier to entry, this requirement could not be applied to CMRS providers. *Ibid.*

Similarly, the Seventh Circuit in *Bastien* reviewed state-law claims alleging, among other things, that a CMRS provider sold service to subscribers in Chicago without building the infrastructure necessary to support reliable service. 205 F.3d at 985. The court held that the claims were preempted state-law regulation of market entry because they "tread directly on the very areas reserved to the FCC: the modes and conditions under which [a CMRS provider] may begin offering service in the Chicago market." *Id.* at 989.

The decision in *Bastien* is in accord with the FCC's determination that Section 332(c)(3)(A) "completely preempts" all state authority to impose conditions on market entry by CMRS providers. The FCC rejected Ohio's petition for authority to engage in CMRS regulation because "the statutory language is not broad enough to accommodate Ohio's apparent interest in asserting authority to regulate marketplace entry by CMRS providers." *Ohio Order* at ¶ 45.

Moreover, the PUCO's requirement of separate operations and accounting for CMRS wholesale and retail services conflicts directly with the FCC's decision — for significant

policy reasons — *not* to require separate wholesale and retail operations or accounting by CMRS providers. *Resale NPRM* at ¶¶ 42-55; *Resale Order* at ¶ 12. Thus, even in the absence of express preemption under Section 332(c)(3)(A), the PUCO's requirement that CMRS providers maintain separate wholesale and retail operations and accounting would be unconstitutional under traditional conflict preemption principles. See *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992).

II. THE OHIO SUPREME COURT HAS INTRODUCED CONFUSION AND UNCERTAINTY INTO A VITAL AREA OF THE ECONOMY IN WHICH CONGRESS HAS MANDATED NATIONAL UNIFORMITY

The ramifications of the Ohio Supreme Court's plainly erroneous holding on the federal preemption questions presented in this case are profound for CLP, for the CMRS industry, for the administration of federal statutes preempting state rate regulation, and for federal preemption law generally. All of these consequences flow from the Ohio Supreme Court's ultimate decision — in irreconcilable conflict with this Court's *Abilene Cotton* line of cases — that the State has authority to decide whether a CMRS provider's rates are unreasonably discriminatory.

The PUCO's assertion of jurisdiction to decide rate discrimination claims against CMRS providers and its findings that CLP violated Ohio law by failing to separate its wholesale and retail operations and that CLP's hypothetical "internal wholesale rate" was zero were used by Cellnet to bring a treble damages action against CLP. See page 15, *supra*. Faced with over $1 billion in potential liability — based on the absurd proposition that CLP had violated Ohio law by failing to offer its service to Cellnet for nothing — CLP was forced to settle that case. But, because Ohio entertains rate discrimination claims against CMRS providers, CLP is still at risk of being subjected to similar claims by numerous other CMRS resellers who bought or merely sought service from CLP.

Any reseller who paid (or was asked to pay) any amount at all for wireless services from CLP could present a claim of discrimination based on the PUCO's finding that CLP's "internal wholesale rate" was zero. Any such reseller would also try to take advantage of the fact that there is no statute of limitations on complaints filed with the PUCO. *Competitive Retail Elec. Serv. Standards*, No. 02-565-EL-ORD, 2002 WL 31938953 (PUCO Sept. 26, 2002); Ohio Rev. Code § 4905.26. Any reseller that filed a discrimination complaint with the PUCO and received a favorable determination could seek to file an action for treble damages under Ohio Rev. Code § 4905.61.[8] Moreover, virtually every other CMRS provider in Ohio, including New Par, failed to completely separate its wholesale and retail operations and therefore will be subject to the same treble damages exposure under Ohio law. The potential effect on CMRS in Ohio and adjacent states would be devastating.

Indeed, the effects of the Ohio Supreme Court's decision will extend far beyond Ohio's borders because, as described above, the service areas for CMRS providers often include multiple states. A decision by Ohio finding that a CMRS provider's rates were unreasonable or mandating separate wholesale and retail operations would therefore have an impact in adjacent states. Those other states might have a very different assessment of the reasonableness of the CMRS provider's rates or how its operations should be structured. Conflict is inevitable.

Most states already prohibit unreasonable rate discrimination by public utilities. See, *e.g.*, Ark. Code Ann. § 23-3-119; Colo. Rev. Stat. § 40-3-102; Ga. Code. Ann. § 46-2-55. If, as a result of the decision below, other states asserted jurisdiction over CMRS rate discrimination claims, the result would be regulatory chaos. The national regulation of CMRS rates sought

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[8]A cause of action for treble damages arises when the PUCO makes a finding of rate discrimination. Ohio Rev. Code § 4905.61. A party has one year from that determination to file a complaint. *Id.* § 2305.11.

by Congress would be destroyed. And the jurisdiction of the FCC — which has repeatedly rejected state requests for regulatory authority to address rate discrimination — would be undermined. The congressional scheme of competitively set CMRS rates overseen by the FCC would be usurped by state-law rate discrimination claims.

The unsettling effect of this regulatory turmoil on the wireless industry and CMRS providers would weaken the Nation's telecommunications infrastructure. In the last ten years, under a stable federal regulatory regime, CMRS providers have attracted over $100 billion in capital investments to build a national wireless infrastructure. If the states were now free to assert jurisdiction over market entry and rates for CMRS through state-law rate discrimination claims and to impose treble damages liability for "unreasonably" discriminatory CMRS rates, the growth and investment in CMRS would be stunted.

These potential consequences flow from a fundamentally unsound decision on federal preemption by the Ohio Supreme Court. Contrary to that court's holding, claims of unreasonable rate discrimination — enforced by treble damages liability — do regulate rates, as this Court has long held. If the Ohio Supreme Court's approach were extended to other federal statutes, the authority of Congress and the federal government to limit state rate regulation would be seriously eroded.

Review by this Court is necessary to effectuate Congress's intent in devising a regulatory program for CMRS. At a minimum, the views of the FCC should be heard before allowing the Ohio Supreme Court's decision to undermine the Commission's jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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